Supreme Court, U.S.
FILED
AUG 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-42

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DONALD JOSEPH CLIFT, *et al.*,
Petitioners,

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is the six-month statute of limitations in Section 10(b) of the Labor Management Relations Act, which is applied to employees' hybrid Section 301/duty of fair representation claims, the appropriate statute of limitations for related employee claims under the Labor Management Reporting and Disclosure Act (LMRDA) for breach of union membership rights during ratification of a collective bargaining agreement?

2. Does the application of the six-month limitation period to LMRDA claims of this kind violate any civil rights of union members guaranteed by federal labor law or the fifth amendment of the Constitution?

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BRIEF IN OPPOSITION

STATUTES INVOLVED

The competing statutes of limitation considered by the Seventh Circuit are Section 10(b) of the Labor Management Relations Act, 29 U.S.C. Section 160(b), and Indiana Code 34-1-2-1.5.

29 U.S.C. Section 160(b) provides in relevant part:

Provided . . . no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the

service of a copy thereof upon the person against whom such charge is made.

Ind. Code 34-1-2-1.5 provides:

All actions relating to the terms, conditions, and privileges of employment except actions based upon a written contract (including, but not limited to, hiring or the failure to hire, suspension, discharge, discipline, promotion, demotion, retirement wages, or salary) shall be brought within two years of the date of the act or omission complained of.

STATEMENT OF THE CASE

Petitioners are four employees of Navistar (formerly International Harvester) at its assembly plant in Indianapolis, Indiana. They are represented for purposes of collective bargaining by Local 98 and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. On September 6, 1983, petitioners filed a federal class action suit against Navistar and Local 98, Region 3 and the International Union, UAW, broadly challenging the Master Recall provision adopted on May 3, 1982, as part of the UAW-Navistar national agreement.[1] (Record, at 2.)[2] Under the Master Recall provision, employees with seniority in a Navistar plant that is closed in whole or in part are placed

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[1] Although styled as a class action, the class was never certified in the district court. The Seventh Circuit ruled that the plaintiffs' brief was inadequate to preserve their objections to the court's failure to certify the class. The questions presented in their pending petition to this Court are not addressed to this aspect of the lower courts' decisions.

[2] Reference to the Record are to the page numbers in the record prepared for the Seventh Circuit. (Hereafter, designated R., ——). References to the Transcript are to the Transcript of the Preliminary Injunction Hearing on December 14 and 15, 1983, which was a separately bound part of the Seventh Circuit record. (Hereafter designated Tr. ——).

on a Master Recall List.[3] Navistar is required to fill job openings in its other UAW plants with employees off the Master Recall List. Employees who transfer to other plants under this procedure are entitled to carry with them their full accumulated seniority. (R.21). Prior national agreements, going back to 1961 had also permitted employees to transfer with seniority in plant closing situations. (R.21). The effect of the Master Recall provision was to systematize the procedure for transfer to surviving Navistar locations. (Tr. 219, 159-60).

Petitioners were among three hundred and fifty (350) employees on layoff from the Indianapolis assembly plant when the Master Recall language was negotiated and ratified by the union membership.[4] The ratification vote for Indianapolis Local 98 was held on May 2, 1982. Notice was provided through postings and handbilling at the Navistar plant and by publicity in local newspapers and on radio and television. (R.22; Tr. 192, 203-204; R.28). In spite of these efforts, many laid-off members

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[3] The Master Recall provision of the 1982 agreement provides in relevant part:

> The most senior qualified employee on the Master Recall List will be offered placement on open jobs at the respective Company operation after all qualified employees at that operation have been recalled from layoff.
>
> Once an employee on the Master Recall List, as a result of a Plant or Partial Plant Closing, has been placed at a Company operation on an open job, the employee will carry his/her company service and previous bargaining unit seniority to the new bargaining unit. The employee's racial and seniority rights at the home operation will be terminated.

(R.21)

[4] Under the UAW Constitution, membership ratification of all collective bargaining agreements is required. (R.23). Where a national agreement is involved, the votes of members in all locals to be covered by the agreement are pooled, and the majority vote of the membership as a whole determines whthr a contract is ratifid. (R.21 and 23).

did not receive notice of the ratification meeting. (R.25). All who learned of the meeting were permitted to attend and participate in discussion of the agreement. (R.22, R.25; Tr. 59, 111-112). At the meeting, the language of the Master Recall provision was read to the membership and was accurately summarized in a hand-out. (R.22, Tr. 19, 22, 29).

In accordance with the provisions of the UAW Constitution, employees who had been laid off for more than six months and who had not tendered dues or applied for out of work credit were not members-in-good-standing entitled to vote on ratification.[5] Because petitioners had been on lay-off for more than six months and had not paid dues or applied for out-of-work credit, they could not vote at the ratification meeting. UAW members nationwide who voted on ratification approved the agreement by a substantial margin.[6] The agreement took effect on May 3, 1982. It was printed and distributed to employees at the Indianapolis plant on September 15, 1982. (R.22).

Following adoption of the 1982 agreement, work at the Indianapolis plant expanded and by March, 1983, all laid-

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[5] Under Article 16 of the UAW Constitution, a UAW member remains in good standing as long as his dues and assessments are paid up and he has not been subjected to discipline or taken a voluntary withdrawal. (UAW Constitution, Art. 16, Sections 8, 10, 18-19; R.23). A UAW member on lay-off automatically retains his good-standing for the first six months of his layoff because, under Article 16, Section 18, a laid-off employee is granted a six months' out-of-work credit which excuses his duty to pay dues. After the six month period an employee is no longer automatically in good standing. R.23, Art. 16, Section 19). To remain in good standing after the six-month period expires, the member must demonstrate continued interest in the union either by the payment of dues or by filing a written certification for out-of-work credits to excuse the dues-paying requirement.

[6] The UAW membership nationwide ratified the 1982 Navistar agreement by a vote of 7086 to 3949.

off employees had been recalled.[7] After that time, the company filled openings in the plant with employees from the Master Recall List. These new employees were credited with their full previous seniority earned at other Navistar plants. As a result, they now hold higher positions on the plant seniority list than petitioners.

Petitioners' complaint was filed on September 6, 1983, sixteen months after adoption of Master Recall. In their complaint, they alleged that the manner in which the Master Recall provision was negotiated, ratified and adopted violated the provisions of the Labor Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. Sections 411(a)(1) and (2), and the National Labor Relations Act, 28 U.S.C. Section 185, *et seq.*[8] According to plaintiffs, as a result of the adoption of this proposal, their contractual layoff and recall rights, job bidding and job preference rights have been "substantially diluted." As a remedy, they requested an injunction against application of the Master Recall language and a return to the *status quo ante* in effect prior to ratification of Master Recall. In addition, they seek actual and punitive damages for losses attributable to the implementation of the Master Recall provision.

The district court entered summary judgment in favor of Navistar and the union defendants. The court ruled in an unpublished decision that plaintiffs' action was barred by the six month statute of limitations contained in 29 U.S.C. Section 160(b). The court also ruled that plaintiffs could not amend their complaint to add allegations of violations of the United States Constitution because the union's conduct in this case did not amount to

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[7] Plaintiffs Clift and Hatcher were recalled in June, 1982. Plaintiff Romaine was recalled in October, 1982. Plaintiff Wilson was recalled on January 10, 1983. (See Opinion of Seventh Circuit, Petitioners, Appendix, at A-14).

[8] A copy of plaintiffs' amended complaint is included as an appendix to this brief.

state action. (Petitioners App., A-21). On appeal, the Seventh Circuit affirmed. *Clift v. International Union, UAW*, 818 F.2d 623 (7th Cir. 1987).

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit's Application Of The Six-Month Statute Of Limitations In This Case Is Not In Conflict With The Decisions Of Other Circuits

This Court held in *DelCostello v. Teamsters*, 462 U.S. 151 (1983), that the most analogous statute of limitations for cases involving employee claims against their employer and union in a hybrid Section 301 duty of fair representation action is the six-month period contained in Section 10(b) of the Labor Management Relations Act, 29 U.S.C. Section 160(b). While reasserting its ordinary practice of borrowing analogous state statutes of limitations for federal actions, the Court departed from that practice in favor of a federal statute of limitations designed to accommodate a balance of interests "very similar to the interests at stake in a Section 301/ duty of fair representation action." The six-month period was found to strike the proper balance between employee interests in avoiding arbitrary or discriminatory action by union representatives and the strong competing interest in stability in collective bargaining matters.

The Seventh Circuit found that a similar balance was implicated in this case where employees claim that the union improperly adopted, ratified and implemented a provision of the collective bargaining agreement and seek to have that agreement retroactively undone. Petitioners' single-count, amended complaint set forth one course of conduct which petitioners alleged violated both the union's duty of fair representation and the LMRDA "bill of rights." Under these circumstances, the Seventh Circuit applied the reasoning of *DelCostello* to invoke the six-month statute of limitations for plaintiffs' claims under both statutes.

This decision is not in conflict with the First Circuit's decision in *Doty v. Sewall*, 784 F.2d 1 (1st Cir. 1986). The *Doty* plaintiff claimed that the Teamsters had denied him union membership because of his active opposition to the union's actions. This conduct was alleged to violate the "bill of rights" for union members contained in Title I of the LMRDA, 29 U.S.C. Section 411-412. No claims relating to employment rights or to interpretation or enforcement of a collective bargaining agreement were asserted. The First Circuit concluded that the balance of interests in a free-standing LMRDA bill of rights claim is more analogous to a state civil rights action than to the Section 301/duty of fair representation action involved in *DelCostello*. Accordingly it declined to apply *DelCostello's* six-month statute of limitations and instead adopted the three-year state tort statute which had been applied in other civil rights actions.

However, the First Circuit in *Doty* expressly declined to decide "whether and under what circumstances an LMRDA claim also involving union and employer action relating to employment can be the subject of suit filed beyond the six months period." 784 F.2d at 4-5. In this context, the *Doty* court left undisturbed its earlier decision in *Linder v. Berge*, 739 F.2d 686 (1st Cir. 1984), which applied to *DelCostello* six-month statute of limitations to an LMRDA claim joined with claims involving the plaintiff's employment rights under a collective bargaining agreement.[9] Thus the court below properly concluded that the *Doty* decision was limited to its facts and that the facts in this case are distinguishable.[10] (Petitioners' App., A-12 n.5).

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[9] The court in *Doty* also distinguished the Seventh Circuit's decision in *Vallone v. Local 705, Teamsters*, 755 F.2d 520 (7th Cir. 1984), in which the court first applied the six-month statute to a combined LMRDA and duty of fair representation case.

[10] Similarly, the Second Circuit's recent decision in *Rodonich v. Laborers Local 95*, 817 F.2d 967, 125 LRRM 2578 (2d Cir. 1987),

All five of the Circuits to decide the LMRDA limitations issue since *DelCostello*, have applied the § 10(b) period to actions arising under the LMRDA and which also involved claims relating to employment rights. *Clift v. International Union, UAW*, 818 F.2d 623 (9th Cir. 1987); *Local 1397 v. Steelworkers*, 748 F.2d 180 (3rd Cir. 1984); *Linder v. Berge*, 739 F.2d 686, 690 (1st Cir. 1984); *Vallone v. Teamsters*, 755 F.2d 520 (7th Cir. 1984); *Adkins v. International Union of Electrical Workers*, 769 F.2d 330, 335 (6th Cir. 1985). See also, *Miller v. Jeep Corp.*, 774 F.2d 111, 114 n.2 (6th Cir. 1985). No Court of Appeals has reached a contrary conclusion.

Here petitioners cannot be said to present a "free-standing" LMRDA claim entitled to the longer statute of limitations in *Doty*. The principal reason for adopting the relatively short six-month statute of limitations in *DelCostello* was to protect stability in the enforcement of collective bargaining agreements. Petitioner's action, rather than presenting a pure "bill of rights" claim, attacks the manner in which the UAW-Navistar national agreement was negotiated, adopted and enforced. It seeks to undo a collective bargaining provision which has been in effect since 1961, which has governed the transfer of hundreds of laid-off employees to surviving Navistar plants in other locations, and which has settled seniority rights for Navistar employees nationwide.

There is nothing in the *Doty* decision, or the decision of any other circuit, which suggests that the Seventh Circuit's decision to apply the *DelCostello* six-month statute of limitations in this case is unwarranted. Contrary to plaintiffs' assertion, the decision of the Seventh Circuit

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is factually distinguishable. That case involved internal discipline of union officers; no employment rights were at stake. *Rodonovich* merely follows *Doty* in applying a longer state statute of limitations in cases where the LMRDA rights do not relate to collective bargaining issues.

is not in conflict, either actually or in principle, with the decision of any other federal circuit. As this is the only substantial basis for granting the writ set forth in the petition in this case, the petition for a writ of certiorari should be denied.

II. The Petition Fails To Present Any Question Of Sufficient Importance To Justify Granting The Writ Of Certiorari Under Supreme Court Rule 17

Petitioners' second argument in support of their petition asserts "genuine issues of fact" and "fundamental error" in the Seventh Circuit opinion. This argument fails to frame an issue worthy of this Court's consideration under its own Rule 17. Moreover, the argument addresses the merits of petitioners' underlying claim, which have never been considered or ruled on by the courts below.

It is unclear from the petition whether petitioners seek to contest in this Court the rulings below that they do not have a cause of action for violation of their rights under the fifth amendment of the United States Constitution. (Petitioners' App., A-15, A-21). The petitioners' second Question Presented refers to rights guaranteed by the Constitution, but does so in the context of application of the statute of limitations. Argument on the issue is briefly included in the argument on the appropriate statute of limitations. (Petition, at 14-17). Under Supreme Court Rule 21.5, such as oblique reference to the constitutional issue is insufficient to present it for this Court's consideration.

Moreover, the constitutional issue, even if properly raised, is not a substantial one. Petitioners asserted below that the union's negotiation, ratification and adoption of the Master Recall provision deprived them of property rights in their seniority without due process. With this allegation, they seek to raise a constitutional claim. However, a union's discharge of its collective bar-

gaining functions would be subject to constitutional scrutiny only if it were "conduct fairly attributable" to state or federal government. *Lugar v. Edmondson Oil Co. Inc.*, 457 U.S. 922, 937 (1982). The primary focus on applying this standard is on the nexus between the challenged action of the defendant and the state's relationship to the defendant and involvement in the particular action. *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982). The nexus requirement is designed

> to assure that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which plaintiff complains. [Emphasis in original]

Blum, 457 U.S. at 1004.

This Court has expressly rejected the claim that the negotiation of seniority provisions is subject to review under constitutional principles. In *United Steelworkers v. Weber*, 443 U.S. 193, 200 (1979), the Court stated that the collectively bargained affirmative action plan that impaired the seniority of white union members "does not involve state action." Similarly, in *United Steelworkers v. Sadlowski*, 457 U.S. 102, 121 n.16 (1982), the Court dismissed for lack of state action the claim that a union rule prohibiting non-member contributions in union elections violated the first amendment.

The seniority rights which petitioners assert here are contractual rights not constitutional rights. It is left entirely to the negotiating parties to decide whether to provide for seniority and to determine the manner of its calculation and the manner in which it is extinguished. *See Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). No state action is involved in the private negotiation of collective bargaining agreements.

For this reason, petitioners are mistaken in relying on the decision in *Beck v. Communication Workers of*

America, 776 F.2d 1187 (4th Cir. 1985), *aff'd on rehearing en banc*, 800 F.2d 1280 (1986), *cert. granted*, 55 U.S.L.W. 3807 (1987). The Fourth Circuit's *en banc* decision in *Beck* held that there was federal jurisdiction over a challenge to the union's use of agency shop fees for matters not directly related to collective bargaining.[11] Two judges of that court concluded that a union's collection of agency shop fees, as expressly authorized by federal and state law, implicates first amendment concerns where individuals assert that these mandatory assessments are being exacted to pay for political activities which they do not support. Five judges disagreed with this proposition; three did not find it necessary to reach the constitutional question.[12]

The issue in *Beck* is not the issue in this case. *Beck* implicated first amendment concerns which are not present here. *Compare Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. ——, 106 S.Ct. 1066 (1986); *Railway Employees' Department v. Hanson*, 351 U.S. 225 (1956); *Ellis v. Brotherhood of Railway Clerks*, 466 U.S. 435 (1984). Even the panel opinion which found state action in *Beck* recognized that all union collective bargaining conduct does *not* raise constitutional questions, noting the Supreme Court's decision in *United Steelworkers v. Weber, supra.* As the *Beck* court observed, in *Weber*, as in this case, the collectively bargained provision at stake "was purely voluntary, based on no statutory or

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[11] Five judges concluded that federal jurisdiction lay under Section 8(a)(3) of the LMRA, 29 U.S.C. Section 158(a)(3), and under the federal common law duty of fair representation. A sixth judge found jurisdiction only over the duty of fair representation claims. Four judges dissented from the finding of federal jurisdiction.

[12] Other circuits have held that, even in this narrow context, union action is not state action. *Price v. UAW*, 795 F.2d 1128 (2d Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3593 (U.S. Dec. 23, 1986) (No. 86-1055); *Kolinske v. Lubbers*, 712 F.2d 471 (D.C. Cir. 1983).

regulatory authorization." 776 F.2d at 1209. *See also Hovan v. United Brotherhood of Carpenters*, 704 F.2d 641, 642-643 (1st Cir. 1983).

Except in the traditionally sensitive area of union expenditure of mandatory assessments on political concerns not shared by dissenting employees, no court has suggested that the regular collective bargaining activities of labor unions amount to state action. Union conduct in this area is already limited by the judicially created duty of fair representation and the congressionally created duties imposed by the LMRA, 29 U.S.C. Section 158(b) and by the LMRDA, 29 U.S.C. Section 411.[13] No purpose could be served by imposing an additional layer of amorphous constitutional regulation on the collective bargaining process.

Petitioners' attempt to import constitutional standards into what is essentially a collective bargaining dispute has no basis in Supreme Court precedent or in decisions of the lower courts. Accordingly, it does not present a substantial issue for this Court's consideration. To the extent this issue is preserved in the petition in this csae, the petition should be denied.

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[13] As the First Circuit observed in *Hovan:*

> A 'govermnental action' finding also would constitutionalize' many of the statutory provisions of the [LMRDA], particularly those contained in its Bill of Rights.' Doing so might come as a surprise to Congress, which thought the statute necessary to impose the obligations it contains, and it would "freeze" those obligations, making modification or revision in light of experience difficult if not impossible. [Citations omitted]

704 F.2d at 643.

CONCLUSION

For the foregoing reasons the Petition for a Writ of Certiorari to the Seventh Circuit should be denied.

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